

Sonu Singh Vs. Behari Singh

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Court : Kolkata

Decided On : Aug-30-1905

Reported in : (1906)ILR33Cal283

Judge : Pratt and ;Bodilly, JJ.

Appellant : Sonu Singh

Respondent : Behari Singh

Judgement :

Pratt and Bodilly, JJ.

1. The decree-holder, who was a co-sharer landlord, having obtained a decree for rent, brought to sale the holding of the judgment-debtor, and it was purchased by a third party. The judgment debtor applied to have the sale set aside on the ground that the decree-holder had a subsisting mortgage of a portion of the holding, and was precluded by Section 99 of the Transfer of Property Act from causing the sale of the holding, except by a suit under Section 67 This contention was upheld by both the lower Courts and the sale was set aside. The auction-purchaser appeals, and on his behalf it is contended

(1) that a mortgage of only a portion of the property would not have the effect of making void the sale of the whole, especially as the mortgagor did not object when the sale was proclaimed,

(2) that the sale could not be set aside in execution proceedings under Section 244 of the Civil Procedure Code.

2. It has been held by this Court in *Sheodeni Tewari v. Ram Saran Sing* (1898) I.L.R 26 Calc. 164 and in *Shib Dass Dass v. Kali Kumar Roy* (1903) I.L.R. 30 Calc. 463 that a sale in contravention of the provisions of Section 99 of the Transfer of Property Act is void, and though in those cases the purchaser was the mortgagee himself and the whole property had been mortgaged, we do not see how the sale can be less void when a third party is the purchaser and only a portion of the property was under mortgage. The sale was of the whole undivided property and cannot be split into parts. Those cases were recently followed in an unreported decision of the Chief Justice and Mitra J. in second appeal No. 85 of 1904 decided on the 5th June last. As regards the mortgagor raising no objection before the sale, it must be observed that no duty was imposed upon him to do so, it being the decree-holder alone, who was responsible for the particulars to be entered in the sale proclamation. The objection to the inapplicability of Section 244 of the Civil Procedure Code in such a case was effectively disposed of in the case of *Mayan Pathuti v. Pakuran* (1898) I.L.R. 22 Mad. 347.

3. The appeal fails on both grounds and is dismissed with costs.